United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-7242

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket #75 - 7242

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PETER ROSENBRUCH,

Plaintiff-Appellant,

against

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Appellee.

B P/S

On Appeal from The United States District Court for the Southern District of New York.

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PETITION FOR REHEARING

Petitioner respectfully requests a rehearing by this Court as to certain matters stated in its decision of April 19, 1976, affirming the decision of the District Court.

I

It is respectfully submitted, the opinion of this Honorable Court with respect to the deviation issue, on its face directly conflicts with a landmark entrenched decision of the U. S. Supreme Court, two analogous decisions of this Court, the relevant statutes of the United States and with established legal principles.

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This panel held that the bill of lading clause "Stow underdeck only" was deleted by the carrier unilaterally, so that it "was not part of the contract of carriage". For the purposes of this petition only, petitioner will not take issue with this holding. However, this deletion is not a statement in the bill of lading that the shipment is stowed on deck, as required under 46 U.S.C. 1301(c). The deleting of the clause "Stow underdeck only" merely left no definite agreement as to stowage. This Court in Encyclopedia Britannica vs. Hong Kong Producer, 422 F 2d 7, held:

> "If there is no definite agreement one way or another, the shipper is entitled to expect below deck stowage."

This panel then went on to hold that the carrier's tarrifs (incorporated by reference in the bill of lading) gave it the option to stow the containers on deck, so there was no deviation. In so doing, this Court erroneously held, in effect, that the carrier's bill of lading provisions and tariffs may overrule contradictory federal statutes (cited below) and the applicable precedents of the Supreme Court and this Court.

In Encyclopedia Britannica, this Court held under 46 U.S.C. 1301(c) a bill of lading option to stow the containers on deck does not permit the carrier to stow the containers on the deck of the ship. Consequently, the Court held that the stowage on deck of the containers was a deviation, and an unrea-

sonable one. In Encyclopedia Britannica, this Court held that a mere option in the bill of lading to stow containers on deck does not prevent a deviation; the bill of lading must state that the shipment is being carried on deck! The language of this Court is as follows:

> "The relevant part of sec. 1301(c) which defines goods says, 'The term goods includes goods, wares [etc.] * * * except * * * cargo which by the contract of carriage is stated as being carried on deck and is so carried.' The bill of lading (short form and long form combined) nowhere states that the cargo is being carried on deck. Clause 13 says it may be so carried but not that it is being so carried."

Citing the Supreme Court in St. Johns vs. Cia Geral, 263 U.S. 119, this Court held that absent a clause on the bill of lading indicating on deck stowage, it was a deviation to stow containers on deck even though the carrier had the option, in these words:

> "The Supreme Court held that the issuance of the clean bill was, in effect, an exercise of the option in favor of below deck stowage, and because the cargo was stowed on deck, there was a deviation which made the carrier liable for the lost goods."

Citing the effect of 46 U.S.C. 1301(c), this Court held:

> "As in the St. Johns case, the option could not be left to be exercised by the actual placing of the cargo on deck or below deck. The bill of lading did not, therefore, qualify the goods within the exception to sec. 1301(c) as '* * * cargo which by the contract of carriage is stated as being carried on deck * * *.' "

Thus it is clear that when this panel held in the instant case that it was not a deviation to show the plaintiff's cargo on deck because its bill of lading and tariffs gave it the option to do so, it clearly contravened the authorities and precedents set forth above including the Supreme Court, this Court, and federal statutes.

The panel in the instant case also contravened its own decision in DuPont vs. Mormacvega, 493 F 2d 97, where this Court held that where containers were stowed on deck pursuant to a bill of lading which does not state that the cargo is stowed on deck, it was indeed a deviation! It is respectfully submitted that the decision in the instant case that on deck stowage was not a deviation despite the fact that the bill of lading was clean (i.e., it did not state that the goods were stowed on deck) conflicts with the decision of this Court in DuPont above. In the DuPont case, this Court held that although the on deck stowage of the containers was a deviation, it was "excusable, justifiable and therefore reasonable within the meaning of sec. 4 of COGSA".

In the instant case, there was no proof offered by the carrier to refute the prima facie unreasonableness of the stowage of the cargo as required in sec. 46 U.S.C. 1304(4). Hence under the statute, the deviation was unreasonable, and it is respectfully submitted the lower Court should have been reversed.

The relevant statutes which are paramount to the carrier's contravening bill of lading terms and tariffs are the following:

46 U.S.C. 1301(c) which defines non-deviating cargo stowed on deck as where the contract of carriage states the goods are stowed on deck.

46 U.S.C. 1304(4) provides that a deviation in loading cargo is prima facie unreasonable.

46 U.S.C. 1313(8) provides that any clause, covenant or agreement in a contract of carriage lessening the carriers' liabilities other than as provided in the Act shall be null and void and of no effect.

46 U.S.C. 1312 specifically provides that the Carriage of Goods by Sea Act shall be paramount to every contract of carriage.

No authority is needed to establish that a carrier's bill of lading terms and tariffs, even if properly filed with an administrative body, may not overrule the above cited statutes of the United States. See Leathers Best vs. Mormaclynx, 451 F 2d 800.

II

The decision in the instant case contravenes the limitation statute, 46 U.S.C. 1304(5) both as to its specific language and the congressional policy. The section regulates the liability of the carrier for the shipper's goods. The 129

packages belonging to the shipper were the only shipper's goods falling within the language and spirit of the statute. There was no factual or legal basis whatsoever for this Court to ignore the shipper's 129 packages, and to hold that the carrier's permanent equipment was the shipper's property within the spirit or language of sec. 1305(5). This is especially so since the carrier can have no liability to the cargo owner for the loss of its own equipment. Hence, it is manifest that the carrier's equipment is outside the scope of the statute dealing with the carrier's liability for the shipper's property.

This Court's finding that "the contents of the container were not separately packed or labeled" is contrary to the undisputed evidence in the Record below that the goods were packed in 129 separate packages for export by Santini Brothers, as was conceded by the carrier. While the irrelevant fact of labeling was not even mentioned in the Record, the fact of the matter is that Santini did label every package in accordance with an inventory that it prepared for each package.

There is nothing in the Record to establish that the shipment could have been packed in a single wooden crate 40' long by 8' high by 8' wide, as this Court stated. It would be physically and practically impossible to construct a gargantuan wooden case 40' long, even if lumber that length were available.

WHEREFORE it is respectfully requested that this

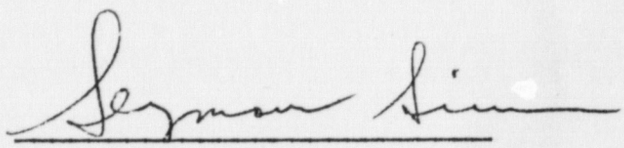
Petition for rehearing be granted, the affirmance vacated and the order of the lower Court reversed, with judgment in favor of the appellant.

Respectfully submitted,

GRAHAM & SIMON, P.C.
Attorneys for Plaintiff-
Appellant.

Seymour Simon
of counsel.

I, SEYMOUR SIMON, member of the firm of Graham & Simon, P.C., hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay.



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STATE OF NEW YORK
COUNTY OF NEW YORK, SS.:

FREDA SEMMEL being duly sworn, deposes and says: deponent is not a party to the action, is over 21 years of age and resides at 1315 W. 7th Street, Brooklyn, New York.

On April 23, 1976, deponent served 2 copies of Petition for Rehearing upon Haight, Gardner, Poor & Havens, Esqs., attorneys for defendant appellee in this action, at One State Street Plaza, New York, N.Y. 10004, the address designated by said attorneys for that purpose, by depositing true copies of same enclosed in a post-paid wrapper properly addressed in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Freda Semmel

Freda Semmel

Sworn to before me this
23rd day of April, 1976.

Seymour Simon

SEYMOUR SIMON
Notary Public, State of New York
No. 41-9014100
Qualified in Queens County
Commission Expires March 30, 19 77